83-416

NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELIZABETH Y. BYRUM et. al
Petitioners

v.

LOWE & GORDON, LTD.
Respondents

and

BARNEY L. BYRUM, et. al.
Petitioners

v.

GARY B. PATTERSON, LOWE & GORDON, LTD.
et. al.
Respondents

FROM APPEALS IN THE
SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

OF COUNSEL:

LAW OFFICES OF J. BENJAMIN DICE &
JOHN MICHAEL CASSELL
421 Park Street
Charlottesville, Virginia 22901

QUESTIONS PRESENTED

1.

Has the use of a State Statute and procedures resulted in decisions repugnant to the U.S. Constitution in violation of the Fourteenth Amendment.

2.

Does the Virginia Statute §8.01-329 violate the Fourteenth Amendment of the U.S. Constitution as to its use in the instant case and generally regarding adequate notice to satisfy the Fourteenth Amendment.

3.

Are the collective and combined processes and decisions of the State Courts repugnant to the U.S. Constitution by denying due process of law in violation of the Fourteenth Amendment.

LIST OF PARTIES

Pursuant to Rule 21.1(b) of the Supreme Court, counsel certifies that the following is a complete list of all parties to the proceedings below and additionally, all parties and persons believed to be interested in the outcome of this Petition:

Richard W. Arnold, Jr.
Counsel for Gary B. Patterson, Trustee, Respondent

Elizabeth Y. and Barney L. Byrum,
Plaintiffs

Bear Investment Company, Respondent

J. Benjamin Dick, Counsel for Plaintiffs

Lowe and Gordon, Ltd., Respondent
John C. Lowe, Esquire, Counsel for Lowe and Gordon, Ltd.

Gary B. Patterson, Trustee, Respondent

W. W. Whitlock, Esquire
Counsel for Bear Investment Company, Respondent

SUBJECT INDEX

LIST OF AUTHORITIES

VIRGINIA RULES AND STATUTES

CONSTITUTIONS

v.

IN THE

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October Term, 1983

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FROM APPEALS IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the judgments of State Courts of Virginia entered in the above styled cases arising from actions in the Circuit Courts of the City of Charlottesville and Louisa

County, Virginia, and affirmed by orders issued by the Supreme Court of Virginia, June 17, 1983.

OPINIONS BELOW

The opinions of the State Circuit Courts, the Circuit Courts of the City of Charlottesville and Louisa County, and the decisions of the Supreme Court of Virginia are printed in Appendix A to this Petition.

JURISDICTION

The judgment of the Virginia Supreme Court by written opinion was entered on April 29, 1983. A timely Petition for Rehearing was filed and on June 17, 1983, the Supreme Court of Virginia denied the Petition to Rehear. Said appeal arose from an Order of the Circuit Court of the City of Charlottesville, Virginia, entered May 24, 1979, entering a Default and Summary Judgment, which was sought to be vacated by state statutory procedures, the Motion being denied by Order of the said State Circuit Court on June 17, 1980.

Per the Rules of the Supreme Court of the United States, Rule 19.4, a second closely related case is joined in this petition for writ of certiorari. The second judgment of the Virginia Supreme Court involving closely related questions involving the same parties and others, and a petition for writ of review on a Judgment dated June

5, 1981 from the Louisa County Circuit Court, Virginia was made before the Virginia Supreme Court and it was denied June 17, 1983, the Supreme Court of Virginia withholding said decision on the writ until final disposition of the first judgment noted above and the petition to rehear were disposed of, which led to said denial of the writ of review.

Jurisdiction of the Court is involved under 28 U.S.C. §1257(3).

VIRGINIA STATUTES INVOLVED

§8.01-319. Publication of interim notice. — A. In any case in which a nonresident party or party originally served by publication has been served as provided by law, and notice of further proceedings in the case is required but no method of service thereof is prescribed either by statute or by order or rule of court, such notice may be served by publication thereof once each week for two successive weeks in a newspaper published or circulated in the city or county in which the original proceedings are pending. If the original proceedings were instituted by order of publication, then the publication of such notice of additional or further proceedings shall be made in the same newspaper. A party, who appears pro se in an action, shall file with the clerk of the court in which the action is pending a written statement of his place of residence and mailing address, and shall inform the clerk in writing of any changes of residence and mailing address during the pendency of the action. The clerk and all parties to the action may rely on the last written statement filed as aforesaid. The court in which the action is pending may dispense with such notice for failure of the party to file the statement herein provided for or may require notice to be given in such manner as the court may determine.

B. Notwithstanding any provision to the contrary in paragraph A hereof, depositions may be taken, testimony heard and orders and decrees entered without an order of publication, when the defendant has been legally served with or has accepted service of process to commence a suit for divorce or for annulling or affirming a marriage, and he or she or the plaintiff:

1. Shall thereafter become a nonresident; or

2. Shall remove from the county or city in which the suit is pending, if a resident thereof, or in which he or she resided at the time of the institution of the suit, or was served with process, without having filed with the clerk of the court where the suit is pending a written statement of his or her intended future place of residence, and a like statement of subsequent changes

of residence; or

3. When after such written statement has been filed with the clerk, notice shall have been served upon him or her at the last place of residence given in the written statement as provided by law.

4. Could not be found by the sheriff of the county or city for the service of the notice, and the party sending the service makes affidavit that he has used due diligence to find the adverse party without success. If such absent party has an attorney of record in such suit, notice shall be served on such attorney, as provided by §8.01-314.

C. This section shall not apply to orders of publication in condemnation actions. (Code 1950, §8-76; 1950, p. 68; 1954, c. 333; 1960, c. 16; 1970, cc. 241, 279; 1977, c. 617; 1978, c. 676; 1979, c. 464; 1982, c. 384.)

§8.01-329. Service of process or notice. — A. When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made in the same manner as is provided for in chapter 8 (§8.01-285 et seq.) of this title in any other case in which personal jurisdiction is exercised over such a nonresident party, or process or notice may be served on any agent of such person in the county or city in this State in which he resides or on the Secretary of the Commonwealth of Virginia, hereinafter referred to in this section as the "Secretary," who, for this purpose, shall be deemed to be the statutory agent of such person.

B. Service of such process or notice on the Secretary shall be made by leaving a copy of the process or notice, together with the fee prescribed in §14.1-103 in the hands of the Secretary or in his office in the city of Richmond, Virginia, and such service shall be sufficient upon the nonresident, provided that notice of such service and a copy of the process or notice are forthwith sent by registered or certified mail, with delivery receipt requested, by the Secretary to the defendant or defendants at such defendant's or defendants' last known post-office

address, and an affidavit of compliance herewith by the Secretary or someone designated by him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in the action. (Code 1950, §8.813; 1977, c. 617.) (Note: Statute in effect May 24, 1979 at time of Charlottesville Circuit Court Order.)

8.01-329. Service of process or notice. — A. When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made in the same manner as is provided for in chapter 8 (§8.01-285 et seq.) of this title in any other case in which personal jurisdiction is exercised over such a nonresident party, or process or notice may be served on any agent of such person in the county or city in this State in which he resides or on the Secretary of the Commonwealth of Virginia, hereinafter referred to in this section as the "Secretary," who, for this purpose, shall be deemed to be the statutory agent of such person.

A1. When service is to be made on the Secretary, the party seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.

B. Service of such process or notice on the secretary shall be made by leaving a copy of the process or notice, together with a copy of the affidavit called for in paragraph A1 hereof and the fee prescribed in §14.1-103 in the office of the Secretary in the city of Richmond, Virginia. Such service shall be sufficient upon the person to be served, provided that notice of such service, a copy of the process or notice, and a copy of the afffidavit are forthwith sent by registered or certified mail, with delivery receipt requested, by the Secretary to the person or persons to be served at the last known post-office address of such person, and an affidavit of compliance herewith by the Secretary or someone designated by

him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in the action.

C. The Secretary shall retain a copy of each notice of service which he has sent to a person sought to be served for a period of two years; provided, however, that the Secretary shall not be required to retain in his records copies of any process, notice or affidavit served upon him. (Code 1950, §8-813; 1977, c. 617; 1979, c.31.)

§8.01-428. Setting aside default judgments; clerical mistakes; independent actions to relieve party from judgment or proceedings; grounds and time limitations. — A. Default judgments and decrees pro confesso; summary procedure. — Upon motion of the judgment debtor and after reasonable notice to the opposite party, his attorney of record or other agent, the court may set aside a judgment by default or a decree pro confesso upon the following grounds: (i) fraud on the court, (ii) a void judgment, (iii) on proof of an accord and satisfaction. Such motion on the ground of fraud on the court shall be made within two years from the date of the judgment or decree.

B. Clerical mistakes. — Clerical mistakes in all judgments or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending such mistakes may be corrected with leave of the appellate court.

C. Other judgments or proceedings. — This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceeding, or to grant relief to a defendant not served with process as provided in §8.01-322, or to set aside a judgment or decree for fraud upon the court. (1977, c. 617.)

§8.01-429. Action of appellate court when there might be redress under §8.01-428. — No appeal shall be allowed by the Supreme Court or any justice thereof for any matter for which a judgment or decree is liable to be reversed or amended, on motion as aforesaid, by the court which rendered it, or the judge thereof, until such motion be made and overruled in whole or in part. And when the Supreme Court hears a case wherein an appeal has been allowed, if it appears that, either before or since the same was allowed, the judgment or decree has been so amended, the Supreme Court shall affirm the judgment or decree, unless there be other error; and if it appear that the amendment ought to be, and has not been made, the Supreme Court may make such amendment, and affirm in like manner the judgment or decree, unless there be other error. (Code 1950, §8.349; 1977, c. 617.)

SUPREME COURT OF VIRGINIA
RULES OF COURT INVOLVED.

Rule 3:17. Judgment by Default.

A defendant who fails to plead to a notice of motion for judgment within the required time is in default. He waives trial by jury and all objections to the admissibility of evidence. He is not entitled to notice, including notice to take depositions, of any further proceedings in the case except that no judgment by default shall be entered, when service of process is effected by posting pursuant default shall be entered, when service of process is effected by posting pursuant to §8.01-296 (2)(b), until ten days' notice shall have been given as required by that section. The court shall, on motion of the plaintiff, enter judgment for the amount appearing to the court to be due. If the relief demanded is unliquidated damages, the court shall hear evidence and fix the amount thereof, unless the plaintiff demands trial by jury, in which event, a jury shall be impaneled to fix the amount of damages.

Rule 3:18. Summary Judgment

Either party may make a motion for summary judgment at any time after the parties are at issue. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in his favor. Summary judgment, interlocutory in nature, may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute. No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5 unless all parties to the action shall agree that such deposition may be so used.

§8.01-290. Plaintiffs required to furnish full name and last known address of defendants, etc. — Upon the commencement of every action, the plaintiff shall furnish in writing to the clerk or other issuing officer the full name and last known address of each defendant and if unable to furnish such name and address, he shall furnish such salient facts as are calculated to identify with reasonable certainty such defendant. The clerk or other official whose function it is to issue any such process shall note in the record or in the papers the address or other identifying facts furnished. Failure to comply with the requirements of this section shall not affect the validity of any judgment. (Code 1950, §8.46.1; 1962, c. 10; 1977, c. 617.)

UNITED STATES CONSTITUTION

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF VIRGINIA

§11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases. — That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

STATEMENT OF CASE

This petition presents an unusual and complicated set of facts and a multitude of events and State statutory procedures embracing decisions of two State lower Circuit Courts wherein, John C. Lowe, Byrums' former attorney was able with the aid of a State Court to rush through a questionable procedural maneuver while the Byrums defended themselves pro se after a long, diligent search through many attorneys none of whom would stand up against Mr. Lowe's ramrod maneuvers. It is incumbent by the rules of this Honorable and Supreme Court that petitioners be concise, brief and clear. Mr. and Mrs. Byrum shall do so and request the Court's patience in that the petitioners stand to lose their property.

Mr. and Mrs. Byrum, who are citizens of the United States and are Virginia residents allege they are being deprived of property, both real property and monetary property, by certain Virginia legislated legal procedures and decisions of the Virginia State Courts.

These decisions so obtained by Mr. John C. Lowe, a Virginia attorney practicing law in Charlottesville, Virginia, who became his clients' creditor, the Byrums assert are fundamentally unfair, unjust, and wrong legally to the extent that their individual rights under the United States Constitution as protected by the due process clause of the Fourteenth amendment are violated. They assert

that they have been denied a trial that was assured to them, that they received inadequate notice to a motion for default and summary judgment requested by their former counsel and that the latter was obtained in their absence, that the notice of the sale of their property six months later was not sent to their proper address per their request by a receipted certified mail to John C. Lowe received by Mr. Lowe, that their attorney retained after the default and summary judgment from Ashland, Virginia who was dealing with the John C. Lowe matter for over four months including the time of the forced sale of their land was not informed of the sale although she had requested to be informed, and that although another attorney who practiced in Charlottesville, Virginia made diligent efforts to stop the sale when contacted by the Byrums four days before the sale, that she as their counsel was ignored by John C. Lowe, his office and Gary B. Patterson, the Trustee.

The Virginia Supreme Court has recently sustained by its written opinion of April 29, 1983 (Appendix A/3) the entry of a "default and summary judgment" against Barney L. Byrum and Elizabeth Y. Byrum (Hereinafter "Mr. and Mrs. Byrum") in the City of Charlottesville Circuit Court, Virginia. The said default and summary judgment thereupon provided the initial basis for the Virginia creditor, Mr. Lowe, to later force a sale of Mr. and Mrs. Byrums' 137 acre Virginia farm in Louisa County Virginia by using a deed of trust that Mr. Lowe had

extracted from his clients under the threat of leaving them at a critical time during his legal representation of the Byrums from 1974-76. The deed of trust to Mr. Lowe secured a bond for future legal services up to the amount of $5,000.00, the same $5,000.00 stated in writing by Mr. Lowe to be his approximate maximum cost of all legal services for the Byrums.

Mr. and Mrs. Byrum claimed that they had paid by evidence of their cancelled checks to Mr. Lowe $3,600.00 of the bond and owed only $1,400.00 on the $5,000.00 due and therefore denied they owed the large cash amount claimed by Mr. Lowe that by the default and summary judgment he readily gained through a Court Order dated May 24, 1979 from the Circuit Court of Charlottesville, Virginia. The Byrums, prior to the May 24, 1979 Order of default and summary judgment, by long distance phone at the March 1979 civil docket call, announced their whereabouts in Florida and available dates to the Court's secretary requesting a trial date after July, 1979. The Court's secretary gave an assurance to the Byrums that it would be no sooner.

Mr. Lowe was there with the Court and obtained a June 15, 1979 trial date. The Byrums had asked for a jury trial, but this trial would be later discarded by the Court when its Order of May 24, 1979 was entered. The Byrums were busy with problems due to deaths in the family and thinking the trial would be after July, 1979, but they alerted friends to forward mail from their

Virginia residence. Certified mail was used by the Court to notify them of the June 15th trial date, but the mail went to their son's Maryland address where no one claimed the certified mail, because their son was away on Government business. It was returned "unclaimed." The Court never sent regular mail nor tried again to contact the Byrums nor did Mr. Lowe, nor did he use regular mail, certified mail always being used and sent where Mr. and Mrs. Byrum happened not to be. Regular mail would have sufficed as they had friends forwarding their mail.

Mr. and Mrs. Byrum had to fight the forced sale of their Virginia farm some seven months later in the Circuit Court of Louisa, Virginia at a trial with restricted issues after having had attempted to redeem their farm prior to that 1979-81 trial in the Circuit Court of Louisa County challenging the sale. Mr. and Mrs. Byrum in such attempts personally tried by phone a day before the November 19, 1979 sale to redeem their land and utilized a Charlottesville lawyer 4-5 days before the land sale who had helped them previously on an unrelated matter. Those efforts by that attorney hired for the moment included a half-hour before-the-sale phone call attempt to redeem the Byrums' farm, and by the evidence presented, was totally ignored by Mr. Lowe, the creditor, and Mr. Patterson, the Trustee, who proceeded to the Courthouse steps to auction the farm. Mr. and Mrs. Byrums' previous phone calls to Mr. Lowe made the day before the forced sale of the Byrums' Virginia farm were

not returned by Mr. Lowe even though as the evidence showed a member of his firm assured the Byrums that Mr. Lowe would call back. The Louisa Circuit Court in its opinion (Appendix A/21-23) held the Byrums had made no such redemption efforts, although three attorneys testified they personally made such efforts.

Mr. Lowe had also refused settlements from a Ashland, Virginia attorney during July-October 1979, and although such cash settlement offers were completely in excess of the $5,000.00 alleged redemption price first claimed during the Louisa Circuit Court trial to be due by the Trustee of the sale and the limit of the amount recited in the bond, it was refused. Mr. Lowe continually, as a creditor with a default judgment in hand, always demanded the $13,319.44 he gained by the default judgment obtained in absentia of the Byrums, (Appendix A/12) and never the true amount due under the bond and deed of trust.

Mr. and Mrs. Byrum were seriously handicapped after the default judgment was entered on May 24, 1979 unbeknown to them. Although they finally retained an attorney on July 1, 1979, their efforts after May 24, 1979 to resolve matters with their former attorney were greatly limited by the need to care for their comatose son who had received a serious head injury on August 2, 1979 and was hospitalized for six months, August-November 1979 in Charlottesville and November 1979-February 1980 in Georgetown. The forced sale of the Byrums'

Virginia farm occurred on November 19, 1979 on the Louisa County Circuit Courthouse steps while the Byrums, still uncertain of their Comatose son's survival, were with him in a hospital in the Georgetown area waiting for Mr. Lowe to answer their call on that day.

Due to the fact that Mr. Lowe had previously obtained the default judgment on the Byrums from the Circuit Court of Charlottesville, Virginia (which an appeal to the Virginia Supreme Court was being processed in the Summer and Fall of 1980 per section §8.01-429 of the Virginia Code from the Order of June 17, 1980, Appendix A/8-9), the Louisa County Circuit Court in the land sale trial, which took from December 1979 and to the Spring of 1981 and contested the forced land sale under the deed of trust (both Courts are part of the Virginia Sixteenth Judicial Circuit), the Louisa County Circuit Court refused any amendments to the Byrums' pleadings in equity that touched on the attorney-client contractual relationship of Mr. Lowe citing the Circuit Court of Charlottesville decision and those amendments were, the Louisa Circuit Court held, "not germane" to the forced sale. (Appendix A/24-25)

The Byrums, as to any substantive evidence that might have successfully attacked the validity or legality of Mr. Lowe's attorney contract with them and that would have assisted in questioning the bond and the deed of trust instruments on Mr. and Mrs. Byrum's land that Mr. Lowe extracted from his clients to continue his legal representation, were barred and stricken (on Mr. Lowe's

Motion) by the Louisa County Circuit Court ruling. The Louisa County Circuit Court restricted the issues to adequacy of price on the Byrums' farm and any alleged irregularities of the sale by the successor trustee as well as his appointment in the Circuit Court of the City of Charlottesville. (The land's present worth is in excess of $100,000.00 and was sold for $31,000.00 at the November 19, 1979 auction to a friend of fifteen years of Mr. Lowe's.

The net result of all actions of these two Virginia Circuit Courts was to give Mr. Lowe absolute control to collect, uncontested, the money he won on a default judgment from his former clients without his claims arising out of the attorney-client contract drawn together with Mr. and Mrs. Byrum, their pleaded denial in their answer to the claims he made in two lawsuits in the Circuit Court of the City of Charlottesville, Virginia, ever receiving an evidentiary and adversary hearing or trial on the merits.

The Virginia Supreme Court did grant a writ of review on the lower court which entered the default and summary judgment. However, by reason of its written opinion of April 29, 1983, the Court reaffirmed, on a petition to rehear, by its decision of June 17, 1983, the default and summary judgment. (Appendix A/1).

In considering that lower Court decision as provided by appellate review, the Virginia Supreme Court decided to withhold its decision on the Byrums' application for a writ of review on the forced land sale of Mr. and Mrs.

Byrums' Virginia 137 acre farm in the Circuit Court of Louisa County, Virginia which decision had been properly appealed until the Virginia Supreme Court disposed of its granted appeal on the Charlottesville Circuit Court judgment. The Louisa Circuit Court had previously suspended and vacated its June 5, 1981 decision until that occurred by Orders of July 22, 1981 (Appendix A/17) and August 13, 1981 (Appendix A/15-16.)

By decision of the Virginia Supreme Court dated June 17, 1983, it denied a writ of review on the forced sale of the Byrums' farm in the Louisa Circuit Court and held "no reversible error" as being the reason to deny a writ of review in that case.

Mr. and Mrs. Byrum thus now stand to lose their entire Virginia farm obtained by a lifetime of work for attorney fees obtained by a default and summary judgment if these decisions of the Virginia State Courts are upheld.

The Byrums always denied the amount of money alleged by Mr. Lowe and have not to this date been afforded an evidentiary and adversary hearing which they assert was taken away from them without adequate notice and safeguards and by improper use of state procedures. Thus the Byrums attack the procedures that gained the default and summary judgment and the decisions that ultimately may deprive them of their real property and livelihood as fundamentally unfair and that due process has not been afforded them by these decisions nor by the procedures used to obtain those decisions. The Byrums still pay the taxes and maintain

the property. The state of legal limbo makes it impossible for them to produce income from the land's timber crop or to sell any portion of their land.

For the record, counsel who represented the Byrums after the May 24, 1979 Order of the Circuit Court of the City of Charlottesville and up to the November 14, 1979 sale of their land, whom the Byrums say Mr. Lowe and Mr. Patterson ignored, were Nina Peace of Ashland, Virginia, Susan White of Charlottesville, Virginia, and Nancy Stamm of Charlottesville, Virginia.

Also for the record, Bear Investment Company, respondent, represented by W. W. Whitlock, Esquire of Mineral, Virginia, purchased the Byrums land at the land auction of November 19, 1979. The President of the Corporation, A. G. Johnson, who testified he knew Mr. Lowe for at least 15 years, made the $31,000.00 bid at the forced land sale.

REASONS FOR GRANTING THE WRIT

Compelling reasons are why a review on Writ of Certiorari should be granted in this case.

1. The State processes and procedures utilized by Mr. Lowe and sustained by the State Courts to obtain the default and summary judgment against Mr. and Mrs. Byrum and thereby provide Mr. Lowe's legal basis to force a sale of the Byrums' Virginia farm to extract money violates their rights of substantive and procedural due process guaranteed by the Fourteenth Amendment of the United States Constitution.

2. The use of a Virginia statute against pro se defendants as used by Mr. Lowe under Virginia Code Section 8.01-319 is entirely suspect as to pro se defendants, and, by its procedural effect in this case by all the circumstances, using inadequate notice for non-residents per section §8.01-329 (when the Byrums were Virginia residents), the same ultimately deprived Mr. and Mrs. Byrum of their property without due process.

3. By foreclosing any evidence challenging Mr. Lowe's legal contract in the Louisa Circuit Court that allowed the Charlottesville Circuit Court default judgment to have a res adjudicata effect, the forced sale of the Byrums' land with the combined decision of the Circuit Court of Charlottesville and Louisa County Circuit Court

to deprive Mr. and Mrs. Byrum of their Virginia 137 acre farm without due process of law.

I

This Petition presents an unusually and complicated set of facts and a multitude of events and state statutory procedures embracing decisions of two state lower Circuit Courts.

Because of the injustice herein recited, I and Mr. and Mrs. Byrum ask for the Court's patience due to the nature of this case.

It is incumbent upon the highest Court of America to scrutinize for these American citizens the Virginia state processes and procedures that would allow such an unfair decision whereby a creditor, a former attorney whose clients became his debtors, obtains an unfair judicial decision and by the impetus of it, later sells their farm to gain his legal fees without the State ever affording the debtors an evidentiary trial on those fee claims that were in fact set at a civil docket call in Charlottesville Circuit Court and later completely discarded on the sole demand of the creditor Mr. Lowe, who obtained in abstentia of the Byrums, a default and summary judgment for $13,319.44 per §8.01-319, Va. Code. Ann.

A. IN THE CHARLOTTESVILLE CIRCUIT COURT OF VIRGINIA

Mr. Lowe or his office drafted and presented

an order in abstentia of the Byrums (Appendix A/10-13) to present to the Charlottesville Circuit Court that went beyond being merely self-serving so to garner an unjust and unfair decision. It represents that the Court gave "every reasonable opportunity to the defendants to appear and to cure their default under section §8.01-319" which by the evidence would not appear to be true. The order was entered May 24, 1979. One of the Byrums son, residing in Maryland, did not receive certified mail at his address giving notice of the motion for default and summary judgment until May 25, 1979, a day after the order had already been entered. (Emphasis added). Mailing it promptly to the Byrums who had commitments in the South due to family deaths, the letter was not seen until June 15, 1983. Immeditately a call to the Judge was made to request help. The Byrums contacting Virginia lawyers, no one would help them. The Court would not help them.

The May 24, 1979 Charlottesville Circuit Court Order states that the Court gave "every reasonable opportunity....properly to notify the Court and the plaintiff of their residence", (Appendix A/12), and, that "the ends of justice require the Court to grant the motion for summary and default judgment in this matter because of the long, vexatious dilatory and unreasonable conduct by the defendants...". This is not true.

First, appearing pro se, Mr. and Mrs. Byrum were sued twice, the first lawsuit being nonsuited. (See Appen-

dix A/13A) They were served personally at their Virginia farm address in the first lawsuit, the address being provided by Mr. Lowe. Having been the Byrums' attorney for several years, he knew their Virginia address and he knew several out of state addresses including a Florida address and he used them from time to time through the years of his representation but failed to use all of them when giving notice that he was demanding a default and summary judgment. When Mr. Lowe did not gain his amendment to that first lawsuit to request a greater monetary claim (Circuit Court of the City of Charlottesville Law #1751), he nonsuited, and the Byrums, who had traveled a 1000 miles from their personal family problems in Florida to Charlottesville in a snow storm and being there physically for trial, were instantaneouly on the nonsuit served with a second lawsuit by Mr. Lowe asking for nearly 3 times more money. No issue of address then ever arose. Making it an issue came post facto on Mr. Lowe's motion per §8.01-319 of the Virginia Code.

The point being Mr. Lowe had no problems, nor had the Court, in knowing the Byrums true address in the first Charlottesville lawsuit, Law #1751. Out of the blue, it was declared as a problem in the second Charlottesville lawsuit, #1879. When this evidence was attempted to be shown the Virginia Supreme Court, it was stricken from the record on motion of Mr. Lowe to the Supreme Court. (Appendix A/7).

The procedures and processes that Mr. Lowe utilized

to gain a default and summary judgment arise nearly totally on the alleged failure of the Byrums to provide an address which allegation the Court accepted uncontested. The Charlottesville Circuit Court ruled in its May 24, 1979 order, that because no address was presented in violation of §8.01-319 of the Virginia Code, the Byrums' "pleadings are stricken." (Appendix A/11)

First, the Rules of Court of the Supreme Court of Virginia governing default and summary judgments are explicit. As to a default judgment, Rule 3:17 states that a defendant who fails to plead to a notice of motion for judgment "within the required time is in default." (Emphasis added) The Virginia Supreme Court in its written opinion readily conceded that "the Byrums again proceeding pro se, filed a timely response to this motion for judgment." (Appendix A/4) (Emphasis added)

It does not take a great deal of legal logic to then conclude the Byrums could not as a matter of Virginia law be legally in "default" and the only way in Virginia one can be in default is by a failure to file a timely response. (Stocket v. Silberman 209 Va. 490 (1969). In a recent Virginia case Landcraft v. Kincaid 220 Va. 865 (1980), the Virginia Supreme Court held "for a reason not explained in the record ... he (Kincaid) was in default when he failed to timely file responsive pleadings." The Byrums in no way by the Virginia law and decisions failed to timely respond, and therefore were not in default.

The Charlottesville Circuit Court ruled in its May 24, 1979 order (Appendix A/11) that because no address was presented in violation of §8.01-319 of the Virginia Code, the Byrums "pleadings are stricken."[1]

Likewise, the Rules of the Supreme Court of Virginia, Rule 3:18 states that summary judgment "shall not be entered if any material fact is genuinely in dispute." (Emphasis added) The Byrums' pleadings which were stricken by order of the Charlottesville Circuit Court, denied Mr. Lowe's complaint and alleged defenses to his claims and, without question, material facts thereby were genuinely in dispute. Virginia cases define Rule 3:18 and have repetively held for the principle stated above. Goode v. Courtney 200 Va. 804 (1909); General Accident Fire and Life Assurance Corp. v. Cohen 203 Va. 810 (1962)

The traditions of our people from this country's birth have stood for fairness and every person's right to have his day in Court. The state has enforced a private claim by a creditor to property of persons and acted to deprive someone of their property by a default and summary judgment. Due process is essential in depriving the person of his property and an adequate evidentiary hearing with adequate notice is fundamental. Sniadach v. Family Finance Corp. 395 U.S. 337 (1969).

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1 Being Virginia residents and served originally at their farm address, good for over twenty years, Mr. Lowe did not put the address on his second lawsuit as he did the first. §8.01-290 requires the same.

The Court did set the Byrums a trial date for June 15, 1979. With the default/summary judgment, the Court simply discarded on Mr. Lowe's representations of May 24, 1979 by the State Circuit Court.

The fundamental requirement of due process of law is an opportunity for a hearing and defense. Truschel v. Rex Amusement Co. 102 W.Va. 215, 136 S.E. 30 (1926), cert. denied 274 U.S. 736, 47 S.Cy. 574, 71 L.Ed. 1316 (1927). Due process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. Matthews v. Eldridge 424 U.S. 319, 96 S.Ct. 983, 47 L.Ed. 2d 18 (1976). Mr. Lowe and the State Courts have interpreted and applied technical rules that in any other and more fair setting, than the unfair one Mr. Lowe garnered by a default and summary judgment, would not likely stand precedural due process tests.

However, all the facts together and circumstances here when seen as a whole in time and place shall unquestionably by the State Courts' decisions deprive the Byrums of their property without due process. The Byrums were not technically in default nor was a summary judgment proper. Yet the Virginia Supreme Court states that decision became "final" and was not timely appealed. Default judgments are peculiar and not like other judgments particularly when they are later discovered.

Justice demands as the Constitution demands

that the Byrums not be deprived of their property by the Virginia State Courts decisions without due process of law.

II

The use of a Virginia statute against pro se defendants as used by Mr. Lowe under Virginia Code Section 8.01-319 is entirely suspect as to pro se defendants, and, by its procedural effect in this case by all the circumstances, using inadequate notice for non-residents per section §8.01-329 (when the Byrums were Virginia residents), the same ultimately deprived Mr. and Mrs. Byrum of their property without due process.

A. IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

Section §8.01-319, used by Mr. Lowe to gain the default and summary judgment, was enacted in 1977 with the revision of the Virginia Civil Code, Title 8.

Section §8.01-319 by the Reviser's notes, Report of the Virginia Code Commission to the Governor and the General Assembly of Virginia, House Document #14, 1977, was old section §8-76, used for non-residents for service by publication except when defendants had been served by 8-51 (personal service) or 8-54, exclusively for divorce cases and if the defendant became a non--

resident thereafter. Up to the Virginia General Assembly revision of Title 8 in 1977, this section was only amended in 1970 requiring an affidavit as to any notice in a divorce action and one had to state in such affidavit that the party had used due diligence to locate the plaintiff without success and that the party had become a non-resident or left where they resided since the suit for divorce, or for annuling or affirming a marriage was filed and service made, and he or she or the plaintiff have thereafter become a non-resident and so on down the line. The revisers' notes state 8.01-319 is old 8-76. (Subsequent revisions in 1978, 1979, 1982 have not materially or substantively altered this statute or its import.)

The Virginia Supreme Court stated in Davis v. Davis 206 Va. 381 (1965) that section 8-76 (predecessor of §8.01-319) and section 8-54 are specific legislation which relate in concise terms specifically to divorce suits. (emphasis added) In fact the 1979 Virginia General Assembly made it clear by adding the language following the word "divorce" in the introductory paragraph of subsection "B" of §8.01-319, "or annulling or affirming a marriage."

The Latin maxim of antiguity in the law, "Expressio Unius Est Exclusio Altenius", the expression of one thing is the exclusion of another would apply in construing the intent of the Virginia General Assembly. The word "Divorce" and the judicial construction of the predecessor statute would clearly indicate that this statute, by the

General Assembly's intent, applies specifically to divorce actions and governs parties in such actions who appear pro se and later become non-residents. This was Mr. Lowe's sole authority in his motion to demand a default and summary judgment against his former clients whom he knew were Virginia residents, not non-residents, and certainly not parties involved in a divorce proceeding. The Virginia Supreme Court has sustained the use of this statute by Mr. Lowe when obviously the statute confers no authority to enter default and summary judgments against resident pro se defendants muchless any defendant, resident or non-resident, who is any party but a party in a divorce proceeding or in annulling or affirming a marriage.

The application of section §8.01-319 by the State Courts took away from the Byrums their scheduled trial date of June 15, 1979. No less, it not being the applicable statute to these pro se defendants, its use that was without any conferring authority to allow a default and summary judgment deprived Mr. and Mrs. Byrum of a hearing and their property without due process. To interpret it otherwise would make the statute vague and therefore unconstitutional if it is not so deficient already in its present form.

Considering then the argued misapplication of section §8.01-319, and even if it could somehow be construed to be an available state statute to be used in favor

of Mr. Lowe, the manner in which Mr. Lowe gave notice of the demand for a default and summary judgment, is latently defective as to minimum safeguards to guarantee due process of providing actual notice of an adversary hearing. Mr. Lowe certified to the Court he had sent personally certified mail to the Virginia farm address. It came back "unclaimed" before he demanded the May 24, 1979 order.

The Byrums as they had announced were temporarly in the South traveling and not at their farm. Nor were they residing at their son's home in Cabin John, Maryland. Thus both certified mails by Mr. Lowe came back "unclaimed" thus vitiating any "actual" notice. The other Maryland address used by Mr. Lowe had long since been abandoned by the Byrums. Mr. Lowe and the Court were aware at the time of these mailings by Mr. Lowe and the Secretary of the Commonwealth that Judge Pickford's "certified" letter of March 1979 addressed to Cabin John, Maryland had been returned "unclaimed." The Byrums asserted that by phone on March 19, 1979 at the civil docket call that their Southern whereabouts were made known to the Court and that commitments there made then unavailable until after July 1979 at which time they could go to trial.

Considering Mr. Lowe obtained a June 15, 1979 date, this fact also was disregarded.

The Cabin John address was not the Byrums' residence which Mr. Lowe knew, but rather the home of Mr. and Mrs. Barney L. Byrum, III the Byrums' son whom as parents and retirees the Byrums visited from time to time. The Secretary of the Commonwealth's salutation was typed to addressee "B.L. Byrum" and "E.Y. Byrum." B. L. Byrum, III signed for the certified mail on May 25, 1979 (The default and summary judgment order being entered the day before on May 24, 1979) Seeing it was from Mr. Lowe, B. L. Byrum, III then forwarded it to his father at a Florida address. The Byrums traveling and on the road, did not see it until June 15, 1979.

The Byrums argued in the State Courts that Mr. Lowe, having represented them, knew they often traveled as retired persons and that they had a traveling address in Florida. Mr. Lowe once sent certified mail to Florida and it was also returned "unclaimed." Mr. Lowe had little success from the use of "certified mail" which by trial and error alone should have suggested he just might use regular mail to addresses that he had used successfully before to give the Byrums notice of his motion.

Mr. Lowe apparently never reported that fact to the Court nor mentioned the Florida address in his self-prepared Order of May 24, 1979 that a Florida address did exist and was used previously by him. The strength of his representations that he tried to reach the Byrums

is that he sent "certified mail." The weakness is that certified mail failed except to the son's Maryland address which came after the May 24, 1979 order was entered. Regular mail to the Virginia farm would have sufficed.

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950) is the leading case authority on substituted service requirements to meet procedural due process and also the authority used by the majority opinion of the U.S. Supreme Court in its recent decision Greene et. al. v. Lindsey, _____ U.S. _____, 102 S.Ct. 1874, 72 L.Ed. 2d 249(No. 81-341) (1982).

The controlling language of Mullane cited in Greene being that it is an elementary and fundamental requirement of due process in any proceeding to be accorded finality that "notice reasonably calculated, under all circumstances., to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections be given." The Byrums were not so apprised which deprived them of a significant interest, their retirement income money, and from that default and summary judgment, Mr. Lowe had the tool of coercion to forced a sale of their real estate from a deed of trust he extracted in his early relationship with his clients for future fees which he used to satisfy that default judgment.

In this regard above, Mr. Lowe used section §8.01-329 of the Virginia Long Arm statute, a procedural

statute to reach out of State non-residents, the Byrums are residents, to give notice that is believed to be inadequate. The statute itself lacks sufficient procedural safeguards to protect a citizen's right of due process. As it applies to the Byrums under all the circumstances, it lacks even more. It appears that this statute could well be unconstitutional on its face as it stood back in 1979. If not facially unconstitutional, it could be unconstitutional in its application to deny the Byrums their right of due process under all the circumstances.

For one such point, no disposition is provided in section §8.01-329 as to the certified mail that the Secretary of the Commonwealth is to send. The only requirement is the affidavit of compliance that it was sent be given and produced to the Court. The statute however states explicitedly "delivery receipt requested." This form of notice by postal service with the language "delivery receipt requested" clearly expresses the intent of the General Assembly that it wanted the recipient to acknowledge his receipt of any such notice from a State agent. This would guarantee that actual notice was had and would certainly if that were the case satisfy due process tests and standard of Mullane and Greene.

However the statute does not then say what the Secretary of the Commonwealth is to do with the receipt. Mr. Lowe never informed the Court that any receipt had been returned nor did the Court inquire, nor does

the Secretary of the Commonwealth have any statutory requirement of disposing of the return receipt so to inform the Court and Mr. Lowe. The effect being, the Byrums, who did not receipt the certified mail did not get notice of the hearing and proceeding against them until after the fact and did not know of the hearing.

The Supreme Court of the United States is aware that many states have revised their laws of substituted service after Mullane. Many state statutes have "return receipt requested" or language similar to Virginia's §8.01-329. However, no decision from the Supreme Court has pondered what disposition of the "return receipt" is to be made, and this small gap in an otherwise legitimate process affords great harm to those in litigation. The U.S. Postal Service which affords all Americans certified or registered mail services is service Americans utilize for the very purpose of getting an acknowledgement back from the addressee. It is an economic incentive and an invaluable means of knowing the mail went through.

Therefore if the State by its agents is authorized to utilize this means, certainly due process under the U.S. Constitution and the Virginia Constitution in a judicial setting demands that the State properly dispose of receipted return mail. Only then the Court from out of which it is requested can be properly informed before any State Court can assist a private claim to deprive U.S. citizens of their property without first knowing

whether those U.S. citizens in fact received substituted notice to inform them that an adverse hearing or proceeding was to occur and they have the right to appear and defend. The substituted notice is inadequate otherwise to safeguard due process. It is only simple logic and fairness that such statutory safeguards are mandated by the United States Constitution.

The combination then of Virginia Code §8.01-319 and §8.01-329 by their combined processes and procedure are antiquated examples in a modern and transient society that have due process inadequacies and are deficient safeguards to properly protect substantive or procedural due process as guaranteed by the Fourteenth Amendment and therefore in their present form and effect are repugnant to the United States Constitution. They must be or otherwise, the Byrums are deprived of a sizable amount of money they denied ever owing to Mr. Lowe, were deprived of a trial date to dispute the claim and their Virginia farm is lost in the default judgment so obtained under substituted service being used by Mr. Lowe so to extract the money he had won uncontested.

Can the United States Supreme Court allow such an unfair and such ramrod decisions to stand in Virginia that any reasonable man or woman in this country would say is fundamentally unfair in view of the understood American traditions of our people for fairness and justice? Mr. and Mrs. Byrum asked that this highest legal institu-

tion, the Supreme Court of the United States of America, intervene to protect their individual rights and afford them the guaranteed due process forever inscribed in the most precious of American documents, the United States Constitution.

III

By foreclosing any evidence challenging Mr. Lowe's legal contract in the Louisa Circuit Court that allowed the Charlottesville Circuit Court default judgment to have a res adjudicata effect, the forced sale of the Byrums land with the combined decision of the Circuit Court of Charlottesville and Louisa County Circuit Court deprive Mr. and Mrs. Byrum of their Virginia 137 acre farm without due process of law.

IN THE CHARLOTTESVILLE CIRCUIT COURT AND THE LOUISA COUNTY CIRCUIT COURT, VIRGINIA

Mr. Lowe obtained his default and summary judgment under section §8.01-319 by substituted notice under §8.01-329 of the Virginia Code in the Charlottesville Circuit Court. Using the only available Virginia civil statutes §8.01-428 and §8.01-429 to attack a "default" judgment in Virginia, the Supreme Court of Virginia sustained these procedures and the judgment below.

The Louisa County Circuit Court of Virginia refused

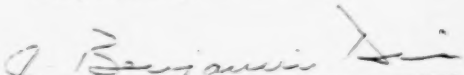
to allow amendments to Mr. and Mrs. Byrums' pleadings that challenged Mr. Lowe's attorney-client contract nor would it allow evidence to challenge what was truly due Mr. Lowe under the bond arrangement for future fees the Court relying on the Charlottesville Circuit Court decision. They were deemed collateral and not sufficiently "germane." (Appendix A/25) The Louisa Circuit Court vacated and suspended its decision to sustain the sale once it learned of the granted writ of review on the Charlottesville Circuit Court case. The ultimate result now in view of the Supreme Court of Virginia decisions to sustain the Charlottesville Circuit Court and refuse a writ of review on the sale of the Byrums' Virginia farm is first, the Byrums were never afforded an evidentiary hearing to contest the alleged fees due, and secondly, a farm appraised in excess of $100,000.00 without a full value on rents and profits, shall be taken for a $31,000.00 auctioned sales price under the deed of trust extracted from Mr. Lowe's client's by Mr. Lowe securing a bond executed in 1974 for $5,000.00.

For this reason and other reasons in the Louisa County Circuit case, the Byrums are forfeiting as well as being deprived of their property without due process of law. The decisions are repugnant to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Attorney for the Petitioner

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421 Park Street
Charlottesville, Virginia 22901
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CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served on all parties required to be served, i.e., on Respondents by placing same in an envelope and depositing it in the United States mail, regular postage prepaid, addressed to counsel of record as follows the 13th day of September, 1983.

John C. Lowe, Esquire
Counsel for Lowe and Gordon, Ltd.
409 Park Street
Charlottesville, Virginia 22901

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Post Office Box 276
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W. W. Whitlock
Counsel for Bear Investment Co.
Post Office Box 128
Mineral, Virginia 23117

J. Benjamin Dick

APPENDIX A

OPINIONS AND JUDGMENTS BELOW

PART I

FROM THE SUPREME COURT OF VIRGINIA

FROM THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE, VIRGINIA

IN THE SUPREME COURT OF VIRGINIA

No. 801458
Circuit Court No. L-1879

Filed June 17, 1983.

ELIZABETH Y. BYRUM, et al., Appellants

v.

LOWE & GORDON, LTD., Appellee

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 29th day of April, 1983, and grant a rehearing thereof, the prayer of the said petition is denied.

/s/ Allen L. Lucy
Clerk

SUPREME COURT OF VIRGINIA

No. 801458
Circuit Court No. L-1879

Filed April 29, 1983

ELIZABETH Y. BYRUM and BARNEY LUTHER BYRUM, Appellant

v.

LOWE & GORDON, LTD., Appellee

Upon an appeal for a judgment rendered by the Circuit Court of the City of Charlottesville on May 24, 1979, and an order entered on June 17, 1980.

For reasons stated in writing and filed with the record, the court is of opinion that there is no error in the judgment and order appealed from. Accordingly, the same are affirmed. The appellants shall pay to the appellee damages according to law and the costs expended herein.

This order shall be certified to the said circuit court.

/s/ Allen L. Lucy
Clerk

FROM THE SUPREME COURT OF VIRGINIA

Circuit Court of the City of Charlottesville

No. 801458

Filed April 29, 1983

ELIZABETH Y. BYRUM, et al.

v.

LOWE & GORDON, LTD.

Opinion by Justice Roscoe B. Stephenson, Jr., Supreme Court of Virginia

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In May, 1979, Lowe & Gordon, Ltd., obtained a judgment against Elizabeth and Barney Byrum. The Byrums moved to set aside this judgment in April, 1980, alleging the court erred for various reasons in entering judgment against them. However, the threshold issue on appeal is whether the 1979 judgment could be attacked 11 months later. Concluding it could not, we do not reach the issue of whether the original judgment was proper.

The appellee, a professional corporation engaged in the practice of law, originally filed suit against the Byrums in June, 1978, for money it claimed was due it for legal services rendered. The Byrums, representing themselves, responded to this suit, giving the court an address in Cabin John, Maryland.

In February, 1979, Lowe & Gordon nonsuited the first suit and personally served the Byrums with a new motion for judgment which increased the amount alleged to be due. The Byrums, again proceeding pro se, filed a timely response to this motion for judgment. However, this responsive pleading contained no address, in violation of Code §8.01-319.

In May, 1979, Lowe & Gordon filed a motion for default and summary judgment. It alleged the Byrums had failed to keep the court and opposing counsel advised of an address where they could be reached and that this made prosecution of the case impossible. A copy of this motion was sent certified mail to the Byrums' home in Virginia and other copies were served by the Secretary of the Commonwealth at two addresses in Maryland, including the Cabin John address the Byrums had previously given the court.

In May, 1979, the court held the Byrums were in default and entered judgment for Lowe & Gordon. The court stated that the Byrums' failure to provide an address had prevented the case from proceeding in an orderly manner, that the Byrums had been "given every reasonable opportunity" to appear, and that Lowe & Gordon has "acted entirely reasonably and patiently in attempting to contact" the Byrums. It concluded the Byrums had engaged in "a long, vexatious, dilatory and unreasonable course of conduct."

As no action was taken to modify this judgment within 21 days, it became final. Rule 1:1. Moreover, no appeal was taken from the May judgment in accordance with our Rules of Court. However, in April, 1980, the Byrums, by counsel, filed a "Motion to Vacate Default Judgment Per §8.01-428."

The Byrums admitted that one of the Maryland addresses was the proper place to reach them and that notice of Lowe & Gordon's motion for default and summary

judgment had been received, although a family member failed to forward it to them in a timely fashion. The Byrums further admitted that Lowe & Gordon had attempted to contact them by telephone, but they had failed to provide an address because they felt they were being harassed. After a hearing on this motion, the trial court refused to set aside the May, 1979, judgment, and the Byrums timely a ppealed from this order.

Code §8.01-428 contains three paragraphs. It is clear that paragraph B, which addresses clerical mistakes, is inapplicable. Paragraph A lists three grounds for setting aside a default judgment. There is no allegation of an accord and satisfaction, and the Byrums have stated they are not proceeding on the ground of fraud on the court. Therefore, in order to fall within paragraph A of the statute, the May, 1979, judgment would have to be void. This is not the case.

The Byrums were properly served with a motion for judgment in February, 1979. The court therefore had personal jurisdiction over them. Further, the Byrums admitted that notice of Lowe & Gordon's attempt to obtain a default judgment against them was received in Cabin John. Therefore, the May, 1979, judgment was not void, and the Byrums are not entitled to relief under §8.01-428A.

As an alternative, the Byrums argue that paragraph C of the statute is applicable. This paragraph also lists three grounds for relief, and again, two, fraud on the court and ineffective service of process, do not apply. The Byrums therefore rely on the first part of this paragraph which states that "[t]his section does not limit the power of the court to entertain at any time an independent action to relieve a party for any judgment or proceeding...."

While the language the Byrums rely on appears broad, we have held it is to be given a narrow construction. Landcraft Co. v. Kincaid, 220 Va. 865, 263 S.E.2d 419

(1980) (involving the predecessor of Code §8.01-428). This is so because judicial proceedings must have a certainty of result, and a high degree of finality must attach to judgments. Landcraft, 220 Va. at 874, 263 S.E.2d at 425.

It is clear the Byrums cannot rely on paragraph C of §8.01-428. The paragraph states that "an independent action" may be brought. The Byrums did not do this. Instead, they filed a motion as part of the cause started in February, 1979. They therefore did not file a proper action under the Code section, and the trial court was correct in refusing to vacate the original judgment.

Paragraphs A and B of Code §8.01-428 speak of a motion, while paragraph C speaks of an independent action. Clearly, by using different terminology in different paragraphs of the same Code section, the General Assembly meant to provide for a different procedure under C than under A and B. This view is reinforced by the Revisers' Note to the Code section which states that paragraph C is meant to preserve "[a] court's inherent equity power to entertain an independent action to relieve a party from any judgment ...." This view is further reinforced by an examination of the predecessor section of Code §8.01-428, Code §8-348, which provided for relief from a default judgment only upon motion.

In conclusion, the Byrums' motion does not allege sufficient grounds under Code §8.01-428 to attack the May, 1979, default and summary judgment. Accordingly, the judgment of the trial court will be affirmed.

Affirmed.

SUPREME COURT OF VIRGINIA

No. 801-458
Circuit Court No. L-1879

File September 14, 1981

ELIZABETH Y. BYRUM, et al., Appellants,

v.

LOWE & GORDON, LTD., Appellee..

Upon an appeal from a judgment
rendered by the Circuit Court of the
City of Charlottesville on May 24, 1979,
and an order entered on June 17, 1980.

Heretofore came the appellee, by counsel, and filed a motion praying, inter alia, that the court strike from the appendix in this case all matters relating to Law No. 1751 (pages 118, et seq.).

Thereupon came the appellants, by counsel, and filed a response in opposition to said motion.

On consideration whereof, the appellee's motion to strike is granted.

/s/ Allen L. Lucy
Clerk

Circuit Court for the City of Charlottesville

At Law No. 1879

Filed June 17, 1980

LOWE & GORDON, LTD., Plaintiff

v.

BARNEY L. BYRUM, et al., Defendants

ORDER

This cause came to be heard on Defendants' Motion to Vacate the Judgment of this Court and upon Motion of the Defendants, the cause was ordered reinstated upon the docket and the motion was heard ore tenus on May 16, 1980: Craig T. Redinger, Esq., appearing as counsel on behalf of Plaintiff and Defendants appearing with their counsel, J. Benjamin Dick, Esq.

Upon hearing arguments of counsel, the Court finds that the findings of fact contained in its order of May 24, 1979, are correct, the Court finds no evidence of fraud nor does the Court find anything to merit vacating the default judgment previously entered and the Court further finds the there are no grounds for an independent action to attack or modify the judgment contained in its order of May 24, 1979, and it appearing otherwise proper, it is hereby

ORDERED, that Defendants' Motion to Vacate the Default Judgment be and it hereby is denied and the Clerk is directed to strike this cause from the docket.

ENTERED this 17th day of June, 1980.

/s/ Herbert A. Pickford
Judge

Circuit Court for the City of Charlottesville

At Law No. 1879

Filed May 24, 1979

LOWE AND GORDON, LTD., Plaintiff

v.

ELIZABETH Y. BYRUM
AND
BARNEY LUTHER BYRUM, Defendants

ORDER

This day came the plaintiff, and moved the Court to grant it summary and default judgment against the defendants for their failure to comply with the requirements of Virginia law in regard to this cause, and upon: The motion for default and summary judgment filed by the plaintiff with notice that the plaintiff would ask the court to enter judgment on the motion at 12:00 noon on May 20, 1979, which written motion was filed with the Court; affidavits from the Secretary of the Commonwealth indicating that a copy of the motion for default and summary judgment had been served upon the defendants pursuant to Va. Code Ann. §8.01-329 at both Box 284, Glen Arm, Maryland 21057 and at 7706 Tomlinson Avenue, Cabin John, Maryland 20731; sworn testimony from John C. Lowe, President of Lowe and Gordon, Ltd., that a copy of the motion for default and summary judgment had been mailed to the defendants at Route 3, Box 448, Orange, Virginia 22960, along with

a P.S. Form 3800 indicating such mailing had taken place; all of the papers filed in Law Number 1879 and Law Number 1751, files of this Court; an original promissory note dated December 31, 1974, payable to Lowe and Gordon, Ltd., in the amount of $3,189.89 bearing 8% interest from December 31, 1974, until paid, executed by the defendants; upon an original promissory note dated December 23, 1972, payable to Lowe and Gordon, Ltd., in the amount of $3,296.72, bearing 8% interest from September 23, 1974, until paid, executed by the defendants; a copy of an amended bill of interpleader in the Circuit court for Montgomery County, Maryland, in the case of Carlton Maryott v. Elizabeth Y. Byrum and Barney Luther Byrum, et al., Equity Number 60,600 which was identified by John C. Lowe, president of Lowe and Gordon, Ltd.; a copy of a petition for authority to pay into registry of court, a check for $7,500.00 in the matter of Carlton Maryott v. Elizabeth Byrum, et al., Equity Number 60,600 in the Circuit Court for Montgomery County, Maryland, with an attached notation to the effect that the check could not be paid into court without the endorsements of Elizabeth Y. Byrum and Barney Luther Byrum; and the ore tenus sworn testimony by John C. Lowe, president of Lowe and Gordon, Ltd., the Court doth make the following findings of fact and conclusions of law.

1. Elizabeth Y. Byrum and Barney L. Byrum have failed to notify this Court or the plaintiff or counsel for the plaintiff of their place or residence and mailing address, or of any changes of residence or in mailing addresses during the pendency of this action, pursuant to Va. Code Ann. §8.01-319, therefore their pleadings are stricken.

2. Using three prior known addresses of the defendants in Glen Arm, Maryland, Cabin John, Maryland and Orange, Virginia, the plaintiff (a) has been unable to contact the defendants for the purpose of proceeding in an ordering manner with discovery and other matters in this suit, all to the detriment of the plaintiff and in controvention of Virginia law, and (b) has properly served the defendants at the aforementioned three addresses with notice of a hearing on the plaintiff's motion for

summary and default judgment, utilizing the Secretary of the Commonwealth, pursuant to Va. Code Ann. §8.01-329 as to the Maryland addresses, and by sending a notice by certified mail to the Orange, Virginia, address. No appearance was made by the defendants pursuant to these notices at the time and place designated for the motion to be made by the plaintiff.

3. The Court has given every reasonable opportunity to the defendants to appear and to cure their default under §8.01-319, and properly to notify the Court and the plaintiff of their residence and their mailing address so that this matter can proceed accordingly to law. The plaintiff has acted entirely reasonably and patiently in attempting to contact the defendants, without success, including several telephone calls made to a telephone number in Cabin John, Maryland, wherein the defendants were last known to be residing according to information given in another legal matter in this Court, Court File 1751.

4. The ends of justice require the court to grant the motion for summary and default judgment in this matter because of a long, vexatious, dilatory and unreasonable course of conduct by the defendants which has effectively prevented the plaintiff from being paid what the Court finds is justly due to it by the defendants.

5. The Court finds that the amounts sued for in this case are justly due to the plaintiff, as evidenced by two promissory notes executed by the defendants, and by a judgment as to which the plaintiff had a contractual right to one-third of any recovery as a fee. Both promissory notes bear interest, attorney's fees and payments of expenses by the defendants and the Court finds the judgment should be awarded as to those elements of the promissory notes, as well.

WHEREFORE, the Court grants judgment in the total amount of $13,319.44 to Lowe and Gordon, Ltd., the plaintiff, against Elizabeth Y. Byrum and Barney L. Byrum, the defendants, as follows:

a. As to the December 31, 1974, promissory note, $3,189.89 principal, $1,248.36 interest to May 24, 1979,

and $798.89 attorney's fees under the terms of the promissory note.

b. As to the September 23, 1974, promissory note, $3,296.72 principal, $1,134.87 interest through May 24, 1979, $797.69 attorney's fees under the terms of the promissory note.

c. $2,500.00 arising out of the representations of the defendants in Maryland in the personal injury action, with $418.33 representing interest at 6% from August 23, 1976, to May 24, 1979.

d. The defendants have a credit of $65.31 towards the foregoing.

ENTERED this 24th day of May 1979.

/s/ Herbert A. Pickford
Judge

SIXTEENTH JUDICIAL CIRCUIT
Herbert A. Pickford, Judge
City Courthouse
315 E. High Street
Charlottesville, Virginia 22901

December 9, 1980

J. Benjamin Dick, Esq.
421 Park Street
Charlottesville, Virginia 22901

Dear Mr. Dick:

Enclosed herewith is a copy of the memo I dictated February 6, 1979, in the matter of Lowe and Gordon, Ltd. v. Byrum. I am sending a copy to Mr. Redinger, along with a copy of your letter of December 9, 1980, wherein you made said request.

Very truly yours,

/s/ Herbert A. Pickford
Judge

Enclosure

Lowe & Gordon, Ltd. v. Byrum 2/6/79

Plaintiff's pleadings are based on a promissory note and a bond claiming approximately $4,000.00 due. Subsequent correspondence in the file indicates the claim is in excess of $8,000.00. All requests for continuance have been opposed by the plaintiff, and I by letter of January 4, 1979, told the Byrums they would have to be present today if they wished to oppose the action. They contacted Susan White this morning and she appeared in court to confess judgment; however, plaintiff Lowe stated he

did not want judgment on the original motion, but desired to amend its motion for judgment. I informed plaintiff Lowe that this matter has been dragged out long enough in this court with plaintiff insisting on trial and tht his motion to amend came too late especially since the Byrums who have come from some distance are not in a position to defend the amended motion today. Plaintiff nonsuited and immediately had new suit papers filed and served upon the defendants. I entered the order of the plaintiff requesting substitution of trustees under the defendants' deed of trust recorded in Louisa County which serves as a collateral for a portion of plaintiffs' claim. This was done pursuant to Code Section 26-48.

APPENDIX A

OPINIONS AND JUDGMENTS BELOW

PART II

FROM THE SUPREME COURT OF VIRGINIA

FROM THE CIRCUIT COURT

OF THE COUNTY OF LOUISA, VIRGINIA

SUPREME COURT OF VIRGINIA

No. 811900
Circuit Court No. C-2319

Filed June 17, 1983

BARNEY L. BYRUM et al., Appellants,

v.

GARY B. PATTERSON, Trustee, et al., Appellees

From the Circuit Court of Louisa County

Upon review of the record in this case and consideration of the argument submitted in support of an in opposition to the granting of an appeal, the court is of opinion there is not reversible error in the judgment complained of. Accordingly, the court refuses the petition for appeal. Code §8.01-675.

/s/ Allen L. Lucy
Clerk

In the Circuit Court of Louisa County, Virginia

Chancery No. 2319

Filed August 13, 1981

BARNEY L. BYRUM, et als., Complainants

v.

GARY B. PATTERSON, Trustee, et als., Defendants

DECREE

Came this matter to be heard upon the 24th day of July, 1981, upon the papers formerly read upon the complainants' motion to vacate and suspend the Court's final decree in this matter which was entered June 5, 1981; and upon the Court's decree of July 22, 1981, vacating and suspending the decree of June 5, until the Court shall have heard counsel for the defendant Patterson in regard to the complainants' motion and considered his position; and was argued by counsel, and counsel having been directed to prepare a draft decree for the Courts consideration, and the Court having considered said decree and given further consideration to the cause, upon said consideration, the Court does hereby continue the vacation and suspension of the Court's final order entered June 5, 1981, and vacated and suspended July 22, 1981, until such time as the Virginia Supreme Court does refuse to hear a writ of error addressed to it in the cause appealed from the Circuit Court of Charlottesville whereby John Lowe sued Barney L. Byrum, Jr., and Elizabeth Y. byrum and obtained a default judgment

or until such case is disposed of by the Virginia Supreme Court if appeal is granted or until such time as the case is disposed of by the Circuit Court of the City of Charlottesville if said appeal being granted results in the case being remanded to the Circuit court of Charlottesville.

And the Court doth Order counsel for the complainants' appeal from the final Order granting default judgment in said case from the Circuit Court of the City of Charlottesville;

And the Court doth note that the defendants object and except to the findings of the Court.

/s/ F. W. Harkrader, Jr.

Judge

CIRCUIT COURT OF LOUISA COUNTY, VIRGINIA

Chancery No. 2319

Filed July 22, 1981

BARNEY L. BYRUM, JR. and
ELIZABETH Y. BYRUM Plaintiffs

v.

GARY B. PATTERSON, TRUSTEE, et al.
Defendant

DECREE

CAME the plaintiffs on June 24, 1981 by counsel on a motion to vacate and suspend this Honorable Court's judgment decree of June 5, 1981 within 21 days as provided in Rule 1:1 of the rules of the Supreme Court of Virginia and on appearance of counsel on June 24, 1981, with the exception of defendant Patterson's counsel, Richard Arnold, Esquire, who was unable to attend and who reserved the right to be heard at a later date before the Court, the said motion was argued by counsel of record who appeared.

The Court having considered the motion solely on the grounds of paragraphs two and three of plaintiffs' motion to vacate and suspend the June 5th decree, does from the date of June 24, 1981 DECREE that the Court's decree of June 5, 1981 entered in this cause is VACATED and SUSPENDED indefinitely until such time the Court shall have heard counsel for defendant Patterson and shall rule otherwise upon this cause being further heard by counsel of record.

/s/ F. W. Harkrader, Jr.
Judge

CIRCUIT COURT FOR THE COUNTY OF LOUISA, VIRGINIA

No. 2319

Filed June 15, 1981

BARNEY L. BYRUM, JR., et. ux, Plaintiff

v.

GARY B. PATTERSON, Trustee, et al.,
Defendant

ORDER

Upon the pleadings and upon the evidence heard ore tenus, the Court does hereby make the following findings of fact:

1. The Order appointing Gary B. Patteson as substitute trustee was valid and not void.

2. Defendant Lowe & Gordon, Ltd. did not fail to make proper demands on the Plaintiffs as required by law for the payment of the bond, prior to instructing the Trustee to foreclose.

3. Defendant Lowe & Gordon, Ltd., breached no duty to the Plaintiffs to give them proper notice that they were in default in the payment of their bond.

4. Defendant Lowe & Gordon, Ltd. nor the Trustee failed to communicate with the Plaintiffs at a proper address, nor did they fail to furnish the Trustee with a proper address for notice in accordance with Virginia law.

5. The Defendant Trustee did not fail to give proper notice to Plaintiffs of the foreclosure, did not fail to use the last known address in accordance with statutory Virginia law, did not fail to make proper demand for payment, did not fail to permit the Plaintiffs to make timely redemption prior to foreclosure and did not fail to protect the Plaintiff's interest in accordance with his duties as prescribed by law.

6. The Byrums at no time exercised their right of redemption to Defendant Lowe & Gordon, Ltd., nor did they do so to the Trustee, nor did their employed counsel do so at the Byrum's direction to either Lowe & Gordon, Ltd., or the Trustee.

7. The price obtained for the property was not so deficient as to be considered inadequate at law.

8. There is insufficient evidence of improperly demanded payment of additional unsecured debts to invalidate this sale.

9. The Trustee did not fail in any duty to examine public records.

10. The Trustees made proper demand for payment in accordance with his obligations under the Law of Virginia;

11. The evidence discloses no improprieties on the part of the Trustee or Lowe & Gordon which would justify invalidation of the sale.

12. A transcript of the proceedings before the Court were prepared for the court and shall so constitute part of the record under Rule 5:9 of the Rules of the Supreme Court of Virginia.

13. Interlocutory orders against the Plaintiffs

were entered by the Court during the course of the proceedings to which the Plaintiffs excepted and which are hereby incorporated into this final decree by reference.

WHEREFORE, the Court finds that the forced sale was not improper and it appearing otherwise proper to do so, it is hereby

ORDERED that Plaintiffs' Bill of Complaint be and it hereby is dismissed and, upon the expiration of 60 days from date, the injunction shall be dissolved.

ENTERED this 5th day of June, 1981.

/s/ F.W. Harkrader, Jr.
Judge

F. Ward Harkrader, Jr., Judge
Sixteenth Judicial Circuit
Box 799
Louisa, Virginia 23093

February 18, 1981

Mr. J. Benjamin Dick
Attorney at Law
421 Park Street
Charlottesville, Virginia 22901

Mr. Richard W. Arnold
Attorney at Law
Post Office Box 276
Louisa, Virginia 23093

Mr. W. W. Whitlock
Attorney at Law
Post Office Box 128
Mineral, Virginia 23117

Mr. Craig T. Redinger
Lowe & Gordon Ltd.
Attorneys at Law
409 Park Street
Charlottesville, Virginia 22901

RE: Barney L. Byrum, Jr., and Elizabeth Byrum
v.
Gary B. Patterson, Trustee, et al

Gentlemen:

The Court has reviewed the evidence in the above captioned matter, in the light of the arguments submitted by counsel. This case has presented great difficulty to the Court because of the volume of evidence and also because of the sympathy raised in the mind of the

Court for the plaintiffs, related to their son's injury in the unfortunate motor vehicle accident which was disclosed, peripheraly in the evidence. The Court is aware however, that sympathy and equity do not always occupy the same ground and it is the duty of the Court to rule in accordance with the principles of equity and not to be influenced by matters of sympathy which are inconsistent with equitable principles.

The Court makes the following findings of facts: 1. The Order appointing Gary B. Patterson as substitute Trustee was valid and not void: 2. The defendants Lowe & Gordon, Ltd., did not fail to make proper demands on the plaintiffs as required by law for the payment of said bond, prior to instructing the Trustee to foreclose; 3. The defendants Lowe & Gordon, Ltd., breeched no duty to the plaintiffs to give them proper notice that they were in default in the payment of their bond; 4. The defendant, Lowe & Gordon, Ltd., did not fail to communicate with the plaintiffs at a proper address, nor did they fail to furnish the Trustee with a proper address for notice in accordance with Virginia law; 5. The defendant Trustee, did not fail to give proper notice to plaintiffs of the foreclosure, did not fail to make proper demand for payment, did not fail to permit the plaintiffs to make timely redemption prior to foreclosure, did not fail to properly advertise the subject property upon foreclosure and did not fail to protect the plaintiff's interest in accordance with his duties as prescribed by law.

We do not find that Lowe & Gordon, Ltd., improperly refused bona-fide offers from the plaintiff to satisfy the debt secured by the Deed of Trust, or that they improperly caused the foreclosure action to proceed.

We further find that: 6. The Byrums at no time exercised their right of redemption; 7. The price obtained for the property, while not a good price, was not so deficient as to be considered inadequate at law; 8. We

find insufficient evidence of improperly demanded payment of additional unsecured debts to invalidate this sale; 9. We do not find that the Trustee failed in any duty to examine public records; 10. We find that the Trustee did make proper demand for payment in accordance with his obligations under the Law of Virginia; 11. The evidence discloses no improprieties on the part of the Trustee or Lowe & Gordon which would justify invalidation of the sale.

We make these findings, not without understanding, that there may have been misunderstanding and misconception in the minds of the plaintiffs, however it would be improper to transfer to the defendants an increased and inequitable burden of responsiblity because of the possible misunderstanding or misconceptions of the plaintiffs for which the defendants were not at fault and not responsible.

Based upon the foregoing findings, the Court holds that the forced sale was not improper and the Bill of Complaint should be dismissed and the Injunction dissolved. However, the Order will provide for a stay of 60 days in order to enable the plaintiffs to perfect their appeal, should counsel indicate a desire to do so. I request that Mr. Redinger prepare the Order in accordance with this letter opinion and submit it to counsel for endorsement.

Sincerely,
F. W. HARKRADER, Jr., Judge

F. WARD HARKRADER, JR., JUDGE
Sixteenth Judicial Circuit
Box 799
Louisa, Virginia 23093

June 12, 1980

Ms. Annie Lee Congdon
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409 Park Street
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Mr. Gary Patterson
Attorney at Law
Post Office Box 56
Louisa, Virginia 23093

Mr. J. Benjamin Dick
Attorney at Law
421 Park Street
Charlottesville, Virginia 22901

RE: Lowe and Gordon, Ltd. v. Barney L. Byrum and Elizabeth Byrum

Lady and Gentlemen:

I have reviewed the amended pleadings offered by counsel for the Byrums' in the light of the arguments

presented by all counsel today.

A review of the amended pleadings offered by counsel for the Byrums in light of the arguments of counsel persuades the Court that in many instances the proffered amended pleadings constitute a bill of particulars on the original bill of complaint. To the extent that this is not true and new and collateral issues are raised, we feel that they are not sufficiently germane to be permitted. To permit such amendments would substantially change the focus of the bill of complaint and would in effect institute a new cause of action, substantially prejudicing the rights of the defendants. Therefore, the motion for leave to amend the plaintiff's pleadings in this cause is denied as not being in furtherance of the ends of justice.

Sincerely,

F.W. HARKRADER, JR., JUDGE